

IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
AT JACKSON

January 12, 2009 Session

**KAREN SHOTWELL v. SERENITY DAY SPA ET AL.**

**Direct Appeal from the Chancery Court for Shelby County  
No. CH-041669-2    Arnold B. Goldin, Chancellor**

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**No. W2008-00374-SC-WCM-WC - Mailed April 14, 2009; Filed August 12, 2009**

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This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated section 50-6-225(e)(3) for a hearing and a report of findings of fact and conclusions of law. Employee alleged that she developed carpal tunnel syndrome as a result of her work as an aesthetician. She was referred to an orthopaedic surgeon, who concluded that her condition was not related to her employment. She had surgery on both arms. An evaluating physician testified that her condition was caused by her employment. The trial court ruled that she failed to sustain her burden of proof with regards to causation. On appeal, she contends that the evidence preponderates against that finding. We affirm the judgment.

**Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right; Judgment of the Chancery Court  
Affirmed**

D. J. ALISSANDRATOS, SP. J., delivered the opinion of the court, in which CORNELIA A. CLARK, J., and TONY CHILDRESS, SP. J., joined.

Steve Taylor, Memphis, Tennessee, for the appellant, Karen Shotwell.

William H. Haltom, Jr. and Erika D. Roberts, Memphis, Tennessee, for the appellees, Serenity Day Spa and State Farm Insurance.

**MEMORANDUM OPINION**

**Factual and Procedural Background**

Karen Shotwell ("Employee") was employed as an aesthetician for Serenity Day Spa ("Employer") for approximately ten months. Her job consisted of tasks related to skin care. She administered facials, body treatments, waxing, and makeup to clients. She alleges that she

developed carpal tunnel syndrome in both arms, and ulnar nerve compression in her right arm, as a result of her work.

Employee testified that she first reported her symptoms to “Naomi” and “Callie,” who were the manager and assistant manager for Employer, in February 2004. She explained that there was a magnifying lamp which she used for facials that could not be properly positioned because it had a loose screw. When using this lamp, she had to hold her hands in an odd position. She attributed the onset of her symptoms to that activity. She testified that she advised both individuals about the lamp and her symptoms. Neither person testified at trial.

On Saturday, April 24, Employee arrived at work smelling of alcohol, unable to walk properly and “shaky.” She cursed at one of her co-workers in the presence of customers and did not leave the premises when asked. Employee admitted at trial that these events occurred. On the following Monday, Lisa McNerney, Employer’s owner, spoke to Employee by telephone and advised her that she was being terminated. It is undisputed that Employee advised Ms. McNerney of her alleged work injury during that conversation.

Employee was referred to Dr. Mark Jobe, an orthopaedic surgeon, through workers’ compensation. She saw Dr. Jobe on June 22 and July 27, 2004. Dr. Jobe diagnosed bilateral carpal tunnel syndrome. He injected her wrists with cortisone, which temporarily relieved her symptoms. Dr. Jobe wrote a letter to Employer’s workers’ compensation insurer which stated that he could not attribute Employee’s carpal tunnel syndrome to her employment. Her claim was thereafter denied. Dr. Jobe testified by deposition. He reiterated the statement in his letter, stating that the causes of carpal tunnel syndrome are “multi-factorial,” and the activities of Employee’s job were not “heavy and repetitive” enough to cause carpal tunnel syndrome. On cross-examination, he stated that Employee’s work “could be a factor” in her carpal tunnel syndrome, but he could not say that it was within any degree of medical certainty.

Employee then sought treatment from Dr. Janovich, also an orthopaedic surgeon. He ultimately performed surgery on both of her wrists and her elbow in September and December 2005. He released her in March 2006 and did not place any permanent restrictions upon her activities. Dr. Janovich did not testify, and his records were not placed into evidence.

Dr. Apurva Dalal, also an orthopaedic surgeon, conducted an independent medical evaluation (“IME”) at the request of Employee’s counsel. He testified by deposition. Dr. Dalal opined that “her employment . . . doing repetitive use of her hand, lifting, doing work, contributed to her developing carpal tunnel syndrome.” Dr. Dalal further testified that carpal tunnel syndrome was common among people who worked as “hairdressers and day spa people.” Dr. Dalal assigned a permanent impairment of 19% to the right upper extremity and 7% to the left upper extremity as a result of carpal tunnel syndrome, ulnar nerve compression, and tendinitis. He recommended that she avoid repetitive work and should not lift in excess of twenty pounds.

David Strauser, a vocational evaluator, testified on behalf of Employee. He conducted an interview and reviewed her medical records. Based upon that information, he opined that she had sustained a 64% vocational disability. On cross-examination, he conceded that he had no knowledge

of her work activities after April 2004.

On the date of trial, Employee was fifty years old. She had a bachelor's degree in an unspecified subject from Eastern Michigan University. She also held an aesthetician license from the state of Tennessee. She was working as a waitress at Cracker Barrel, with the intention of entering a management program. She testified that she had entered an alcohol rehabilitation program after the incident which caused her termination.

The trial court issued its ruling from the bench. It found that Employee had not sustained her burden of proof concerning causation. It discussed the issue of notice, but did not make a specific finding. Employee has appealed, asserting that the trial court erred by finding that Employee did not sustain her burden of proof concerning causation, and also by finding that Employee did not provide proper notice of her injury, as required by Tennessee Code Annotated section 50-6-201.

### **Standard of Review**

Our standard of review of factual issues in a workers' compensation case is de novo upon the record of the trial court, accompanied by a presumption of correctness of the trial court's factual findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2008); see also Rhodes v. Capital City Ins. Co., 154 S.W.3d 43, 46 (Tenn. 2004); Perrin v. Gaylord Entm't Co., 120 S.W.3d 823, 825 (Tenn. 2003). When the trial court has seen the witnesses and heard the testimony, especially where issues of credibility and the weight of testimony are involved, the court on appeal must extend considerable deference to the trial court's factual findings. Houser v. Bi-Lo, Inc., 36 S.W.3d 68, 71 (Tenn. 2001). In reviewing documentary evidence such as depositions, however, we extend no deference to the trial court's findings. Orrick v. Bestway Trucking, Inc., 184 S.W.3d 211, 216 (Tenn. 2006). Conclusions of law are subject to de novo review without any presumption of correctness. Rhodes, 154 S.W.3d at 46; Perrin, 120 S.W.3d at 826.

### **Analysis**

The trial court expressed reservations concerning the medical proof, specifically the absence of any testimony from a treating physician other than Dr. Jobe, who had only seen Employee twice. The trial court suggested that Dr. Dalal's testimony was not sufficiently direct to satisfy even the "could be" standard applicable in workers' compensation cases. It also noted that his IME took place several years after the injury allegedly arose.

Employee cites a recent panel decision, Kelly v. Dollar General Corp., No. W2007-01105-SC-WCM-WC, 2008 WL 4368234 (Tenn. Workers' Comp. Panel Sept. 25, 2008), in support of her position. In that case, the employee worked as an assistant manager of a retail store, which involved a variety of activities. She developed carpal tunnel syndrome. The trial court ruled for the employer, but the Special Workers' Compensation Appeals Panel reversed, noting that the medical proof presented by the employee was not strong but that there was no countervailing evidence

proffered by the employer. Id. at \*4. This case differs significantly from Kelly in that each side has presented expert medical evidence in support of its position.

Employee testified that her job consisted of performing “facials, waxing, body wraps, microdermabrasion, [and] chemical peels.” She agreed with the statement that these tasks “involve[d] repetitive type work with [her] hands.” She stated that the loose lamp caused her to “put [her] hands in a compromising position to do extractions.” This is all of the information in the record concerning her job duties.

Dr. Jobe based his opinion that her carpal tunnel syndrome was not caused by her employment on her history “that she was constantly applying makeup to her client’s faces.” He did not consider that activity to be either repetitive or heavy enough to cause carpal tunnel syndrome. Dr. Dalal’s report states that Employee told him that “her job required her to flex her elbow and perform repetitive motion with both hands.” His opinion that her condition was work-related was based upon his experience: “I do see hairdressers and day spa people routinely, . . . they have to use their hands a lot. And it’s not only just a repetitive action, it’s a repetitive action with force. If they’re doing a massage or a facial or they’re doing anything on the face . . . they have been working with their hands constantly.”

Each doctor apparently based his opinion on his understanding of the forcefulness of the gripping involved in Employee’s work. In our view, her testimony does not provide a sufficient amount of information for the trial court to determine which of the two doctors had a more accurate understanding of her actual work activities. In light of this, we are unable to conclude that the evidence preponderates against the trial court’s finding that Employee failed to sustain her burden of proof. In light of this conclusion, it is unnecessary to address the notice issue.

### **Conclusion**

The judgment of the trial court is affirmed. Costs are taxed to Karen Shotwell, and her surety, for which execution may issue if necessary.

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D. J. ALISSANDRATOS, SPECIAL JUDGE

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**ORDER**

This case is before the Court upon the motion for review filed by Karen Shotwell pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law.

It appears to the Court that the motion for review is not well-taken and is therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to Karen Shotwell, and her surety, for which execution may issue if necessary.

PER CURIAM

CORNELIA A. CLARK, J., not participating.